REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOU CIVIL APPLICATION NO. 182 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND PROHIBITION

AND

IN THE MATTER OF CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 21 (1), 23 (1), 23 (3) (F), 25 (C), 27 (1), 49 (1) (D) & 50 (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAW REFORM ACT SECTION 8 & 9, CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF THE LAND ACT

AND

IN THE MATTER OF COMPULSORY ACQUISITION DRIVE INN PRIMARY SCHOOL AND RUARAKA HIGH SCHOOL

AND

IN THE MATTER OF THE SUMMONING BY THE SENATE SESSIONAL COUNTY PUBLIC ACCOUNTS AND INVESTMENT COMMITTEE

AND

IN THE MATTER OF THE SENATE STANDING ORDERS OF THE SENATE

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE SPEAKER OF THE SENATE.....1ST RESPONDENT

THE SENATE.....2ND RESPONDENT

AND

AFRISON EXPORT IMPORT LIMITED.....1ST EX PARTE APPLICANT

HUELANDS LIMITED.....2ND EX PARTE APPLICANT

JUDGMENT

Introduction.

1. I prefer to start this determination by paraphrasing the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council[1] who said that:-

> *"Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct which could threaten our safety and security, establishing the rules by which we live. It is the baseline."*

2. Law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safe guard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become a instrument of social change.[2]

3. The Rule of Law is guaranteed by our Constitution. It is one of the values enshrined in Article 10 of the Constitution. It is upon this instrument that the *ex parte* applicants stand before this court seeking redress.

The Parties.

4. The *ex parte* applicants are limited liability companies incorporated in Kenya under the Companies Act.[3]The first Respondent is the Speaker of the Senate. The second Respondent is the Senate established under Article **93** of the Constitution.

The application.

5. Pursuant to the leave of this court granted on **4th** May 2018, the *ex parte* applicants moved this court by way of a Notice of Motion dated **22nd** May 2018, seeking the following orders:-

> *a. An order of **Certiorari** to quash the summons dated **30th** April 2018 issued to the applicant's directors by the County Public Accounts and Investments Committee of the **2nd** Respondent to appear before it on **7th** May 2018.*
>
> *b. An order of **Prohibition** to prohibit the **2nd** Respondent's County Public Accounts and Investments Committee from purporting to conduct the hearing that is slated for **7th** May 2018 based on summons dated **30th** April 2018.*
>
> *c. An order of **Prohibition** to prohibit the **2nd**Respondent's County Public Accounts and Investments Committee from purporting to issue any other further summons to the directors of the applicants or any other companies associated with them for any appearance and/or hearing in respect of the ownership and/or compulsory acquisition of Land Reference **LR 7879/4** or any other anonymous complaint against them.*
>
> *d. Such further and other reliefs that this honourable court may deem just and expedient to grant.*
>
> *e. Costs of and incidental to the application be provided for.*

The Factual Matrix.

6. The facts giving rise to the application as far as I can distil them from the face of the application and the verifying Affidavit of **Francis Mburu Mungai**, the Managing Director and the largest Shareholder of the *ex parte* applicants dated **4th** May 2018 are that:-

> *a. **That** the ex parte applicants are the owners of **L.R. No 7879/4**, measuring **96** acres having acquired the same in 1981 from Joreth Limited.*
>
> *b. **That** the government compulsorily acquired **37.4** acres for General Service Unit (GSU) Housing Project, but in Nairobi Commercial Civil Case No. **617** of 2012, the court made a determination that indeed the suit property belonged to the ex parte applicants and ordered the government to pay the ex parte applicants **Ksh. 4,086,683,330/=** as compensation.*
>
> *c. **That** the ex parte applicants negotiated with the government and accepted **Ksh. 2,400,000,000/=** for the 37.4 acres instead of the **Ksh. 4,086,683,330/=.***
>
> *d. **That** the National Assembly's Public Accounts Committee of the **11th** Parliament considered and found no fault in the transaction and subsequently, the property was subdivided in to **L.R. No. 7879/24** measuring **37.4** acres occupied by the GSU, and **L.R. No. 7879/25** comprising the reminder thereof.*
>
> *e. **That** the government expressed intention to acquire a further **13.5364** acres for Drive-in Primary School and Ruaraka High School through a Gazette Notice **No. 6322** dated **30th** June 2017 which schools had been constructed on the suit property way back*

*in 1986 without compensation to the applicants. That the schools are built on a section of **L.R. No. 7879/25**, a sub-division of the original **L.R. No. 7879/4**, the subject of a determination in the above civil case.*

*f. **That** the applicants engaged a professional valuer who valued the **13.5364** acres occupied by the two schools at **Kh. 5,900,000,000/=** but the government's valuer valued it at **Ksh. 3,200,000,000/=** which amount the government offered to pay the ex parte applicants and they accepted, and, the initial sum of **Ksh. 1,500,000,000/=** was paid leaving of **Ksh. 1,700,000,000/= .***

*g. In exercise of its oversight role, the National Assembly Departmental Committee on Lands summoned the ex parte applicant's directors and various government officials to explain the propriety of the said transaction, and, the committee received presentations from the ex parte applicants directors who appeared before it on **19th** April 2018 and **24th** April 2018 and the relevant government officials and it is in the process of compiling its report.*

*h. **That** the ex parte applicants' directors learnt from social media that the Senate County Public Accounts and Investments Committee (hereinafter referred to as the committee), had invited them to appear before it on **3rd** April 2018, and though, they were not formally invited, the committee fined them **Ksh. 500,000/=** for failure to appear. Further, the directors learnt that a further meeting had been scheduled for **17th** April 2018.*

*i. **That** in a letter dated **4th** April 2018, the ex parte applicants demanded that:- **(i)** they be officially summoned; **(ii)** the "irregular" fine be waived and/or set aside;**(iii)** they be served with a copy of the complaint;**(iv)** they had issues they wished to be clarified; **(vi)** whether it had the jurisdiction to investigate the issues.*

*j. **That** the committee in a letter dated **10th** April 2018 summoned them to "shed light on the ownership of land reference **LR No. 7879/4** that is under the acquisition by the National Land Commission for use by two (2) public schools in Ruaraka, Nairobi County," and, that the directors were never informed the nature of the complaint and the issues they wanted clarified in total violation of their constitutional right to fair administrative action.*

*k. **That** the Respondents mandate under Article **93** of the Constitution and Standing Order Number **21 (3)** respectively does not confer them with jurisdiction to investigate and/or oversight the ownership and or compulsory acquisition of land by the National Land Commission; and, that the issue of ownership of Land Parcel **LR No. 7879/4** was determined in the above case; and the propriety or otherwise of the use of public money to acquire the property was interrogated by the National Assembly which is yet to give its report.*

*l. **That** the directors appeared before the committee on **17th** April 2018 and **30th** April 2018, but it exhibited open bias. That the chair and the Vice- chair interrogated the directors on unrelated issues that they were not informed of prior to the meetings. That the committee unreasonably directed all the director's of the ex parte applicant's to appear before it on **7th** May 2018, yet, the ex parte applicant had passed a resolution for the directors to appear with their advocates on behalf of the companies. Further, there is no nexus between the ownership and compulsory acquisition of the suit property since the ex parte applicants who own the suit properties have separate legal personality from its directors.*

*m. **That** the committee refused to furnish the directors with any complaint despite being requested and that the directors are apprehensive that some committee members are in cahoots with the alleged complainants to blackmail and extort money from them.*

*n. **That** the ex parte applicants have since learnt that no complaint was ever officially served to the first Respondent for reference to any committee, but rather some Senate committee members are in cahoots with the alleged "complainants" (if any) to blackmail and extort money from the ex parte applicants. Further, the chairman of the committee gave views in a national newspaper as to why the process is suspicious while the matter is still before the committee.*

Legal foundation of the application.

7. The crux of the applicants' grounds for the Judicial Review orders sought is that the invitation to appear before the committee is *unreasonable, un-procedural* and *illegal* because:-

i. The committee's chairperson commented in the newspapers on a matter pending before the Committee, and, failure to furnish the applicants' with the complaint despite being requested.

ii. Purporting to investigate the applicants yet no complaint had been made.

iii. Purporting to fine the directors Ksh. 500,000/= for failure to appear.

iv. Investigating the land yet ownership had already been determined by a court.

*v. Acting outside its jurisdiction under Article **96** of the Constitution and Standing Order number **21 (4).***

vi. Directing all the directors to appear and interrogating them on irrelevant issues.

vii. Interrogating a matter that had been dealt with by the National Assembly.

Courts directions.

8. On 5th June 2018, the Respondent's counsel by a Notice of Motion dated **30th** May 2018 sought orders to discharge and or set aside the leave granted to the *ex parte* applicants on **4th** May 2018 to apply for orders of *Certiorari* and *Prohibition, and,* an order seeking to set aside and/or discharge the order that the leave granted operates as a stay of the invitation to appear before the committee.

9. On **24th** July 2018, this court directed that the above application be treated as part of the Respondents' response to the applicants' substantive motion. The Court also granted the *ex parte* applicants' leave to file a supplementary affidavit (if need be) to respond to any new issues raised in the application. The court also directed the parties to file and exchange written submissions before the hearing of the *ex parte* applicant's application.

10. Courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of the court is run effectively and efficiently. Invariably this leads to the orderly management of courts' rolls, which in turn brings about the expeditious disposal of cases in the most cost-effective manner. Thus, the above directive was aimed at paving way for hearing of the main motion instead of utilizing valuable judicial time on the interlocutory applications at the expense of delaying determination of the main dispute.

Respondents' Response to the main motion.

11. Pursuant to the above directions, I have extracted the following grounds from the Respondent's aforesaid application which in my view can be deemed to be grounds of opposition to the main motion. *First,* this court lacked jurisdiction to entertain the application since there is no decision capable of being subjected to Judicial Review proceedings; that the Senate's decision to invite the applicants is premised on Articles **94** and **125** of the Constitution and that this court cannot stop the Respondents from performing their constitutional mandate.

12. *Second,* the committee only invited the applicants pursuant to section **18** of the *Parliamentary Powers and Privileges Act*,[4] (herein after referred to as the Act). *Third,* pursuant to Article **96 (3)** of the Constitution, the Senate represents the Counties and serves to protect their interests and their governments. *Fourth,* the Senate determines the allocation of national revenue among counties. *Fifth,* the applicants were paid Ksh**. 1,500,000,000/=** as part payment of the suit property and are set to be paid a further enormous amount from public funds, hence, it's prudent that the Senate verifies the propriety of the transaction.

13. In addition to the grounds distilled from the said application, **Jeremiah Nyengenye**, the Clerk of the Senate swore the Replying Affidavit dated **23th** July 2018. He avers that:-

> *a. **That** the applicants' application seeking leave dated **4th** May 2018 was improperly before the court because this court lacks jurisdiction since there is no decision made by the Senate capable of being quashed.*
>
> *b. **That** the applicants misled the court that the committee lacks jurisdiction yet the role of Parliament is contained in Article **94** of the Constitution.*
>
> *c. **That** the applicants were only invited to appear before the committee to provide information relating to the suit premises.*
>
> *d. **That** that the legislature has powers to issue summons to any person to appear and provide information on any question, and that, failure to honour summons has penal consequences as provided under section **19 (3)** of the Parliamentary Powers and Privileges Act,[5] and in any event, the directors were merely invited as opposed to being summoned.*
>
> *e. **That** Article **10** of the Constitution binds all State organs, and that Parliament is mandated to oversee national resources, which the ex parte applicants have benefited from.*
>
> *f. **That** that only one director appeared and after the committee requested the other directors to appear, the applicants filed this case and that a search indicates that Justin Sam Mburu is not a director and or a shareholder of either of the companies, yet he executed a Deed of Indemnity to the National Land Commission as a director on behalf of the companies.*
>
> *g. **That** it is prudent to have the said transaction scrutinized by the Committee pursuant to its mandate under Article **125** of the Constitution.*
>
> *h. **That** the applicants have not shown malice, that, other individuals have been invited over the same transaction including the Chairman, National Land Commission, Cabinet Secretary, Ministry of Finance, Governor, Nairobi County Government, the Attorney General, the Cabinet Secretary, Treasury, and the Intergovernmental Technical Relations Committee, hence, the allegations of malice are unfounded.*
>
> *i. **That** the orders sought seek to quash and prohibit the Respondents from exercising their constitutional mandate and that the court can only intervene where the public body has violated the Constitution.*

***Ex parte* applicants' Replying Affidavit.**

14. **Mr. Francis Mburu Mungai** in his Replying Affidavit filed on **28th** June 2018 in response to the applicants' above mentioned application in so far as it is relevant to the main motion, averred that the power conferred upon the Respondents to summon any person can only be exercised within the confines of the Constitution, and that the Respondents lacks authority to investigate ownership and or compulsory acquisition of the suit property.

Issues for determination.

15. Upon analyzing the facts presented by the parties and the rival submissions tendered by the respective counsels, I find that three issues fall for determination, namely:-

a. Whether the letter complained is a decision capable of being quashed.

b. Whether the committee acted within its constitutional and statutory mandate in summoning the ex parte applicants.

c. Whether the ex parte applicants are entitled to any of the Judicial Review Orders sought.

a. Whether the *letter* complained is a decision capable of being quashed.

16. The *ex parte* applicants' counsel did not file written submissions, but he opted to make oral submissions in court. Even though the issue under consideration is fairly dispositive, counsel for the *ex parte* applicants did not directly address it. The only argument relevant to this issue as far as I can discern it from his submissions is that this case seeks to challenge the power of the Senate to conduct investigations. He cited *County Government of Kiambu & Another vs Senate & Others*[6] and argued that this court has jurisdiction to adjudicate this case under Article **165 (3) (d)** of the Constitution. He also cited *International Legal Consultancy Group vs The Senate & Another.*[7]My understanding of his argument is that he invoked the vast jurisdiction of this court conferred by Article **165 (3) (d)** of the Constitution which was not contested as opposed to the doctrine of ripeness which is the crux of the Respondents' case.

17. **Mr. Mwenda,** counsel for the Respondents' submission on this ground was that "no decision had been made to be subjected to Judicial Review proceedings." He invited this court to decline jurisdiction on this ground.

18. The applicants' application is expressed under sections **8** and **9** of the Law Reform Act[8] and Order **53** Rules **1 (2), (2), (3),** & **(4), 3 (1)** of the Civil Procedure Rules. These provisions require an application for Judicial Review to be brought to challenge a decision, an order or proceedings. It should be recalled that sections **8** and **9** of the Law Reform Act[9] are borrowed from common law principles which traditionally governed exercise of Judicial Review jurisdiction. Consistent with these common law principles, my understanding of **Mr. Mwendwa's** argument is that the letter complained of is not a decision, but a mere invitation to the Respondents' to appear before the committee to provide the required information.

19. In my view, **Mr. Mwendwa's** argument can hold sway if we are to determine the issue before me based on traditional common law Judicial Review principles. The Constitution of Kenya, 2010, fundamentally changed the legal landscape in this country. However, this court cannot shut its eyes on express constitutional dictates as discussed below and determine a matter purely on common law principles.

20. Article **47** provides for the right to a fair Administrative Action. To give effect to Article **47**, Parliament enacted the Fair Administrative Action Act.[10] Section **2** of the act defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

21. On the face of the above constitutional provision and the right to access justice guaranteed under Articles **48**, the right to enforcement of the Bill of Rights under Article **22,** and the authority of the court to uphold and enforce the Bill of Rights under **23**, the question that arises is whether a citizen citing violation or threat of rights is requires to wait until the violation occurs.

22. Section **7 (1)** of Part two of the sixth schedule to the Constitution provides that:-

(1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."

23. All law must conform to the constitutional edifice. It follows that the provisions of sections **8** and **9** of the Law Reform Act[11] and Order **53** of the Civil Procedure Rules must be conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution.

24. As the Supreme Court of Appeal of South Africa observed[12] *"All statutes must be interpreted through the prism of the Bill of Rights."*This statement is true of decisions made by statutory bodies and State organs. The governing statute and the resultant decision must be interpreted through the prism of Article **47** of the Constitution. It is beyond argument that Article **47** codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[13] Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.

25. Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others**[14]*** that *"the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."*The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

26. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. *First*, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. *Second*, the right to access the Court is now constitutionally guaranteed. This makes the requirement for the existence of a decision, order or proceedings should be read to include any administrative action as defined in section **2** of the Fair Administrative Action Act.[15]*Third*, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article **23(3)(f).** *Fourth,* section **7** of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section **7 (2)** of the act provides for grounds for applying for Judicial Review.

27. Court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision.[16] Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.

28. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

29. It is therefore my conclusion that all that an applicant is required to do is to demonstrate that the impugned decision whether it is a letter order or proceedings violates or threatens to violate the Bill of Rights or violation of the Constitution. No matter how noble and worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail. Suffice to say that the *ex parte* applicants have in the recitals in the heading to their application invoked Articles **21 (1), 23 (3) (f), 25 (c), 27 (1), 47 (1), 49 (1) (d) & 50 (2)** of the Constitution.

30. It is my conclusion that the letter complained of falls within the ambit of an administrative decision as defined section **2** of the Fair Administrative Action Act,[17] a legislation that was enacted to give effect to Article **47** of the Constitution. To that extent, the application before me is well grounded on the law and since letter is capable of being quashed should the court find that it was issued in a manner inconsistent with the law or in violation of Article **47** of the Constitution and the Fair Administrative Action Act.[18]

b. Whether the committee acted within its constitutional and statutory mandate in summoning the ex parte applicants.

31. The *ex parte* applicant's counsel questioned the Senate's mandate under the Constitution to undertake the oversight in question. He insisted that two courts have pronounced themselves on the question of ownership of the land, namely, case No. **617** of 2012 and JR ELC No. **72** of 2008. He argued that Article **96 (3)** of the Constitution is inapplicable in the circumstances of this case. To buttress his argument, he cited *International Legal Consultancy Group vs the Senate*. He added that the committee is established under Standing Order No. **214** which does not confer it with oversight mandate on National Revenue which in his submission is conferred upon the National Assembly under Article **95 (4) (c).** He also argued that the *ex parte* applicants submitted themselves before the National Assembly, which prepared a report, hence, there is a danger of two reports. He also argued that a public body can only do what it is legally mandated to do.

32. **Mr. Mwendwa,** for the Respondents' argued that the committees invitation is premised on Articles **94** & **125** of the Constitution. He submitted that this court cannot stop the Respondents from undertaking their constitutional mandate. He stated that the invitation is grounded on section **18** of the Parliamentary Powers and Privileges Act[19] and that the directors were invited as opposed to being summoned. Additionally, he submitted that under Article **96 (1)** of the Constitution, the Senate represents the counties. Also, he argued that Article **96 (3)** of the Constitution grants the Senate mandate to determine allocation of national revenue among counties. He added that a sum of **Ksh. 1,500,000,000/=** has already been paid to the *ex parte* applicants who are set to be paid more money hence the need for the Senate to interrogate the issue.

33. To buttress his argument, **Mr. Mwendwa** quoted Prof. Archibald Cox who stated *"...constitutional adjudication must recognize that the peculiar nature of the court's business gives it a governmental function which cannot be wholly discharged without the simple inquiry, 'which decision will be the best for the country.'*[20]He argued that the question before this court requires a decision that will benefit the country as a whole as opposed to an individual and added that a cardinal principle of the Constitution is that of checks and balances.[21]

34. The role of the Senate is to protect the interests of the counties and their governments through representation at the national level, legislating on laws affecting the counties and playing its oversight role over national revenue allocated to counties.[22] Article **96** of the Constitution stipulates the role of the Senate as follows:-

> *1) The Senate represents the counties, and serves to protect the interests of the counties and their governments;*
>
> ***2)** The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles **109** to **113.***
>
> *3) The Senate determines the allocation of national revenue among counties, as provided in Article **217,** and exercises oversight over national revenue allocated to the county governments.*
>
> *4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article **145.***

35. The Senate exercises its role through legislative and oversight process. In the case of *Mwangi Wa Iria & 2 Others vs Speaker Murang'a County Assembly & 3 Others*,[23] the court recognized the role of the Senators as representative and protector of the interests of the counties.

36. Apart from its legislative role at the national level on issues affecting the counties, the Senate has an oversight role over national revenue allocated at the county level. The objective of this role is to protect the interests of the counties from misappropriation of public funds at the county level. Relevant to the issue under consideration is section Part **VI** of the Parliamentary Powers and Privileges Act[24] which provides as follows:-

> ***18. Invitation and summoning of witnesses***
>
> *1) Parliament or its committees may invite or summon any person to appear before it for the purpose of giving evidence or providing any information, paper, book, record or document in the possession or under the control of that person and, in this respect, Parliament and its committees shall have the same powers as the High Court as specified under Article 125 of the Constitution.*
>
> *2) A summons issued under subsection (1) shall be issued by the Clerk on the direction of—*
>
> *a. The Speaker, or*
>
> *b. the chairperson of a committee acting in accordance with a resolution of the committee.*

37. A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:- **(a)** that statutory provisions should always be interpreted purposively; **(b)** the relevant statutory provision must be properly contextualised; and **(c)** all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in **(a)**.[25]

38. This Court has severally held that the correct approach to the interpretation of the Constitution is to have regard to the language and the context of the provision concerned. In addition, a generous and purposive interpretation should be adopted which gives expression to the underlying values of the Constitution.

39. Article **125** must be interpreted in the context of other relevant constitutional provisions. In this regard the following provisions of the Constitution are relevant. Article **2(1)** which provides for the supremacy of the Constitution; Article **2 (2)** which provides that no person may claim or exercise State authority except as authorized under the Constitution; Article **10** which stipulates national values and principles of governance which include transparency and accountability; Article **201 (d)** which provides that public money shall be used in a prudent and responsible way; and Article **119** which grants every person the right to petition Parliament to consider any matter within its authority.

40. I find it fitting to borrow the words of the Constitutional Court of South Africa in *EFF vs Speaker*,[26] that the National Assembly is the voice of all South Africans and the watchdog of State resources:-

> *"It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made to the populace through the State of the Nation Address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office.... No doubt, it is an irreplaceable feature of good governance in South Africa."*

41. To achieve this constitutional purpose, oversight over executive action must be real and effective, and not illusory or rendered nugatory. [27] This is vital because the design and architecture of our constitutional dispensation is that Parliament, is a "watchdog of State resources, the enforcer of fiscal discipline and cost effectiveness for the common good of all our people.[28] The obligation on Parliament to "oversee" must be viewed in light of the foundational values underpinning the Constitution. This Court identifies the values of constitutionalism, accountability and the rule of law as foundational to the Constitution.

42. Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our constitutionalism.

43. The Parliamentary Powers and Privileges Act[29] does not define the word "person." Section 18 of the Act also talks of "any person." The same words appear in Article **125.** Article **260** of the Constitution defines a person ?person includes a company, association or other body of persons whether incorporated or unincorporated. This definition provides a context within which the word "person" in section **18** of the Act must be interpreted. The applicant are subject to the Constitution.

44. The argument that the ownership question has been the subject of a court determination can only be relevant in so far as it can assist the committee to carry out its investigations but cannot be a global defence to the question before the committee on the prudent use of public resources. It has been alleged that the issue has been investigated by a committee of the National Assembly. Again, that information can only be useful if it is supplied to the committee which is in a better position to determine whether indeed the issues under consideration were conclusively determined by the a committee of National Assembly.

45. In view of my analysis above, it is my finding that the committee acted within its constitutional and statutory mandate in summoning the *ex parte* applicants.

b. Whether the *ex parte* applicants' are entitled to any of the Judicial Review Orders sought.

46. The *ex parte* applicants' counsel argued that the process was flawed with procedural impropriety. He argued that no complaint was filed and that they were not informed what was being investigated, that the committee was biased and exhibited malice in that the chairperson gave opinion on the subject in a newspaper, and, that, the decision is unreasonable in that it requires all the directors to appear before the committee, yet the directors had resolved to sent a representative, and, that the committee raised extraneous matters. He also argued the invitation was made through the press.

47. The Respondent's counsel argued that the Senate has the mandate to summon the applicants' pursuant to Article **93** of the Constitution and that where the Constitution vests powers to a state functionary, courts should be slow in interfering with its mandate.[30]He argued that the court ought not to question any procedural infraction[31] and that it is only in public interest that the orders sought be declined. He also argued that granting the orders sought will go against the cardinal principles of national values and governance which include transparency, integrity and accountability which is the very essence of oversight.

48. In Judicial Review, the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects. The role of the Court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'.

49. The role of the Court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

50. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a Court will not interfere. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:-

> *a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or*
>
> *b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.*

51. *First*, the Respondents invited the *ex parte* applicants pursuant to its powers under Article **125** of the Constitution and section **18** of the Parliamentary Powers and Privileges Act.[32] This answers the question of the legality of the invitation. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our Constitution. It follows that for the invitation to be annulled, it must be demonstrated that it is not grounded on the law.

52. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

> *"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law"**[33]***

53. It is clear that the invitation to appear has its source at Article **125** of the Constitution and section **18** cited above. When the constitutionality of the mandate of a public body is challenged, the court's duty is first to determine whether, through "the application of all legitimate interpretive aids,"[34] the conduct in question is capable of being read in a manner that is constitutionally compliant.

54. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution[35] and the relevant statutory provisions. The court is obliged not only to avoid an interpretation that clashes with the constitutional values, purposes and principles but also to seek a meaning that promotes constitutional purposes, values, principles, and which advances Rule of Law, Human Rights and Fundamental Freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance.

55. A proper construction of the provisions of Article **125** of the Constitution and section **18** of the Act leaves me with no doubt that the Respondents' action is firmly grounded on the said provisions. It is beyond argument that the invitation to appear before the committee has a constitutional and statutory underpinning. It is within the mandate of the Respondents' to perform the oversight role over any person as the Constitution demands. There is nothing to show in issuing the invitation, the Respondents acted outside its stated constitutional and statutory mandate.

56. The invitation to appear before the committee has not been shown to be *illegal* or *ultra vires* or outside its functions. The decision to invite the *ex parte* applicants can only be quashed if the committee acted without jurisdiction or in excess of its powers or if the "decision" is so perverse or unreasonable that it would be against the sense of justice to allow it to stand.

57. *Second*, no abuse of powers has been proved. It has not been shown that the power was not exercised as provided under the law. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the Courts unless the decision under challenge is *illegal*, *irrational*, or *un-procedural*.

58. *Third*, an administrative or quasi-judicial decision can only be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** An administrative decision is flawed if it is *illegal.* A decision is *illegal* if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

59. *Fourth*, statutes do not exist in a vacuum.[36] They are located in the context of our contemporary democracy. The Rule of Law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the Rule of Law and other democratic fundamentals which Parliament has no power to exclude.[37] The courts should therefore strive to interpret powers in accordance with these principles.

60. The obligation of the Senate to perform "oversight" must be viewed in light of the foundational values underpinning the Constitution. This Court identifies the core values of constitutionalism, and values enshrined in Article **10** of the Constitution. This court hoists high the profound importance of ensuring that all citizens remain accountable to the Constitution, thus *ensuring accountability, transparency and good governance*: The Constitution requires that government must be accountable, responsive and open. It also requires that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency. Equally, the citizens are also subject to the Constitution.

61. The Constitution sets high standards for the exercise of public power by state institutions and officials. This informs the reason why the Constitution vested in Parliament oversight role over State officers. To perform this mandate, Article **125** of the Constitution grants either house of Parliament and any of its committees power to summon any person to appear before it for the purposes of giving or providing information. This Court will be acting unconstitutionally if it accepts the invitation to grant orders that will fly on the face of these clear constitutional provisions. The objective of monitoring State officials in order to guard against corruption and malfeasance in public office forms part of the constitutional imperative to combat corruption and to ensure transparency and accountability and prudent use of State resources. In undertaking this mandate, the Respondents are constitutionally mandated to invite or summon any person for purposes of providing evidence. Whereas this Court hoists high the constitutional principle that provides for the right to a fair administrative action, the Constitution must be read holistically so as to achieve its purposes, values and principles. That right must be balanced with the constitutional mandate of the Respondents and the values enshrined in the Constitution.

62. Irrespective of whether the land belongs to the *ex parte* applicants or whether the compensation had been approved, it is important that Parliament performs its oversight function and satisfy itself that indeed the State resources where used or applied in a transparent and prudent manner and for the intended purposes. In other words, whether public funds were properly used is truly a matter within the Respondents' mandate.

63. My above finding arises not only from an interpretation of Articles **2, 10, 96, 125, 201** of the Constitution, but also from the fact that this court is inclined to respect the Senates decision for four reasons, **(a)** it is a constitutional imperative that the constitutional role of the two houses of Parliament must be respected, **(b)** for the court to intervene, there must be clear evidence of breach of the constitutional duty to act fairly and legally on the part of the committee or clear abuse or misuse of discretion, **(c)** that this court has a constitutional obligation and a duty to foster a culture of integrity in government and the public by holding the executive and the public to high standards of ethical conduct, **(d)** the Constitution provides in peremptory terms that every person has an obligation to respect, uphold and defend the Constitution.

64. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be the Constitution, a statute or delegated legislation. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring public bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. The Courts have a duty to ensure citizens respect and observe the Constitution. In my view, failure or refusal by the court to exercise this duty would be treason to the Constitution.

65. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[38]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

66. The facts as presented by the *ex parte* applicants clearly show that they appeared before the committee. They have enumerated in detail the reasons why they were summoned raising doubts as to whether they were not aware of the subject they were required to shed light on. The committee required all the directors to attend. They claim that their preference was to be represented. I see no procedural impropriety in this requirement. They claim to have learnt through the social media. But they are on record stating that they attended and were questioned. By attending as they did, they submitted themselves to the process. They cannot turn around now and claim that they were improperly invited. Again, they cannot be heard to say they did not know why they were being invited. They have disclosed details as to why they were invited in the application.

67. Also, the *ex parte* applicants alleged bias. The allegation here is that the chairperson of the Committee made some comments in a newspaper while the matter was pending before the committee, and that, the committee's chairperson and the deputy exhibited open bias towards the applicants and asked them irrelevant questions.

68. True, the Constitution says administrative action must be lawful, reasonable and procedurally fair and that reasons must be given for administrative action that adversely affects rights. There are two parts to the idea of procedural fairness:- The *first* part is that it is unfair for an administrator to make a decision that adversely affects someone without consulting them first. The *second* part is that the decision-making process must be free from any real or apparent partiality, bias or prejudice. When making a decision, administrators must be seen by everyone to be making the decision fairly and impartially and not because of their own private or personal interest in the matter. As is often said, *"justice must both be done and must be seen to be done."*

69. In the circumstances of this case, can it be said there is a reasonable apprehension of bias? The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude.[39]A reasonable apprehension of bias may be raised where an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision maker would unconsciously or consciously decide the issue unfairly.[40]Would a reasonable person in the circumstances of this case think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly."[41]

70. The Rule Against Bias, (*Nemo in propria causa judex, esse debet*), i.e.; no one should be made a judge in his own cause, is the minimal requirement of the natural justice that the authority giving decision must be composed of impartial persons acting fairly, without prejudice and bias. Bias means an operative prejudice, whether conscious or unconscious, as result of some preconceived opinion or predisposition, in relation to a party or an issue. Dictionary meaning of the term "bias" suggests anything which tends a person to decide a case other than on the basis of evidences.

71. The rule against bias strikes against those factors which may improperly influence a judge or a decision maker against arriving at a decision in a particular case. The basic objective of this rule is to ensure public confidence in the impartiality of the administrative adjudicatory process, for as per Lord Hewart CJ, in *R.v. Sussex, "justice should not only be done, but also manifestly and undoubtedly seen to be done."* A decision which is a result of bias is a nullity and the trial is *"Coram non judice."* Principle of Natural Justice occupied the very important place in the study of the administrative law. Any judicial or quasi-judicial tribunal determining the rights of individuals must conform to the principle of natural justice in order to maintain the rule of law. Effectively, procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker.

72. As the bias rule has expanded to include a great range of decision-makers it has also become more flexible. The courts have repeatedly stressed that the bias rule must take account of the particular features of the decision-maker and wider environment to which the rule is applied. The Supreme Court of Canada explained that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."[42] There are many similar judicial pronouncements which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias -- that of the fair minded and informed observer.[43] This fictitious person provides a vessel in which the courts can impart as little or as much knowledge as is required to provide context. In many cases the courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making. This approach begs the question of whether the fair minded and informed person is a neutral observer or little more than the court in disguise.

73. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that *"justice should not only be done, but be seen to be done."*[44] On this view, appearances are important. Justice should not only be fair, it should appear to be fair. Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be entirely impartial, rather than the narrower problem that they might in fact not be impartial. The importance of the appearance of impartiality has become increasingly linked to public confidence in the courts and the other forms of decision-making to which the bias rule applies.[45] This rationale of the bias rule also aligns with the objective test by which it is now governed because the mythical fair minded and informed observer, whose opinion governs the bias rule, is clearly a member of the general public.

74. The High Court of Australia explained that *"Bias, whether actual or apparent, connotes the absence of impartiality."* Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[46] A claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as "apparent", "imputed", "suspected" or "presumptive" bias. [47]

75. These differences between actual and apprehended bias have several important consequences. Each form of bias is assessed from a different perspective. Actual bias is assessed by reference to conclusions that may be reasonably drawn from evidence about the *actual* views and behavior of the decision-maker. Apprehended bias is assessed objectively, by reference to conclusions that may be reasonably drawn about what an observer might conclude about the *possible* views and behavior of the decision-maker.[48] Each form of bias also requires differing standards of evidence.[49] A claim of actual bias requires clear and direct evidence that the decision-maker was in fact biased. Actual bias will not be made out by suspicions, possibilities or other such equivocal evidence. In the absence of an admission of guilt from the decision-maker, or, more likely, a clear and public statement of bias, this requirement is difficult to satisfy.[50] A claim of apprehended bias requires considerably less evidence. A court need only be satisfied that a fair minded and informed observer *might* conclude there was a real *possibility* that the decision-maker was not impartial.[51]

76. As the House of Lords stated, in formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man."[52]The Lords also made it clear that the standard was one of a "real danger" as opposed to a "real likelihood" or "real suspicion." In a subsequent decision, the House of Lords also affirmed that the fair minded observer would take account of the circumstances of the case at hand.[53]

77. Applying the tests discussed above to the facts of this case, it is my finding that the applicant have not established the requisite tests to persuade the court that there is a likelihood of bias whether actual or apprehended. The mere fact that there was a comment in the news paper underscores the public interest in the issue at hand and the nature and scope of the oversight role of the committee as opposed to personal prejudice. Further, the alleged irrelevant issues have not been specified for the court to appreciate their relevancy or otherwise to the issue under investigation.

78. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

79. The ex *parte* applicants also seek an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any body, tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such body, tribunal, corporation, board or person. A *prohibiting* order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a *prohibiting* order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the invitation to appear has not been established nor has it been established that the Respondents acted illegally or in excess of their powers nor has the decision to invite or summon them been shown to be *illegal*, *irrational* or a *nullity.*

80. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, or where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or legally discharge its legal mandate, or where the judge considers that an alternative remedy could have been pursued. *First,* in this case, the *ex parte* applicants ought to have subjected themselves to the process instead of invoking the Judicial Review jurisdiction of this Court and challenge the outcome if aggrieved.

81. *Second*, while the doctrine of separation of powers does not permit this court to prescribe to the two houses of Parliament which oversight tool it should employ in the exercise of its constitutional mandate, this court can only and should enquire into whether or not the choice exercised is rational. It is my finding that the process employed is rationally connected to a lawful purpose.

82. In view of my analysis herein above, I find and hold that the *ex parte* applicants have not established any grounds for this Court to grant the Judicial Review Orders of *Certiorari* and *Prohibition*.

83. The upshot is that the *ex parte* applicants' application dated **22nd** May 2018 is hereby dismissed with costs to the Respondents.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this **11th** day of **October** 2018.

John M. Mativo

Judge.

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[1] Published in Just Law {2004}.

[2] *Masinga vs Director of Public Prosecutions and Others* (21/07) {2011} SZHC 58 (29 April 2011: High Court of Swaziland.

[3] Act No. 17 of 2017.

[4] Act No. 29 of 2017.

[5] Ibid.

[6] {2017}eKLR.

[7] {2014}eKLR.

[8] Cap 26, Laws of Kenya.

[9] Ibid.

[10] Act No. 4 of 2015.

[11] Cap 26, Laws of Kenya.

[12]*Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and* [2000]

[13] Article 47(1) of the Constitution of Kenya, 2010

[14] *2000 (2) SA 674 (CC) at 33.*

[15] Act No. 4 of 2015.

[16] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[17] Act No. 4 of 2015.

[18] Ibid.

[19] Act No. 29 of 2017.

[20] In the Warren Court: Constitutional Decision as an Instrument of Reform, Cambridge, Mass: Havard University Press, 1968, at p. 118.

[21] Citing *Speaker of the Senate & Another vs Attorney General & 4 Others* {2013}eKLR.

[22] The Kenyan Section of the International Commission of Jurists, Devolution Handbook (2013).

[23] Petition 458 of 2015, [2015]eKLR.

[24] Act No. 29 of 2017.

[25] *Cool Ideas 1186 CC vs Hubbard and Another* {2014} ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (Cool Ideas) at para 28.

[26] NA 2016 (3) SA 580 (CC).

[27] *Democratic Alliance vs Speaker, National Assembly and Others* 2016 (3) SA 487 (CC) at para 17.

[28] *South African Broadcasting Corporation Soc Ltd and others v Democratic Alliance and others (Corruption Watch as amicus curiae)* [2015] 4 All SA 719 (SCA) para 53.

[29] Act No. 29 of 2017.

[30] *Pevans East Africa Ltd & Another vs Chairman, Betting Control and Licensing Board & 7 Others*, CA Civ App No 11 of 2018.

[31] Citing *Speaker of the Senate & Another vs Attorney General & 4 Others* {2014}eKLR.

[32] Act No. 29 of 2017.

[33] *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC).

[34] *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

[35] *Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

[36] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: ‘‘Parliament does not legislate in a vacuum. Parliament legislates for a…liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law’’).

[37] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become ‘‘the ultimate controlling factor in our unwritten constitution’’; and see J. Jowell, ‘‘Parliamentarys' Sovereignty under the New Constitutional Hypothesis’’ [2006] P.L. 262.

[38] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[39]*Committee for Justice and Liberty vs. Canada (National Energy Board),* [1978] 1 S.C.R. 369.

[40] Ibid.

[41]*Committee for Justice and Liberty vs. National Energy Board* {1978} 1 S.C.R. 369.

[42] *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

[43]Minister for Immigration and Multicultural Affairs Ex p Jia (2001) 205 CLR 507 at 539, 551, 584 (distinguishing the standards expected of government ministers compared to other decision-makers); *Bell vs CETA* (2003) 227 DLR (4th) 193 at 204-207 (distinguishing between the standards expected of courts and tribunals); *PCCW-HKT Telephone Ltd vs Telecommunications Authority* [2007] HKCFI 129; [2007] 2 HKLRD 536 at 549 (distinguishing between an administrative authority and a tribunal); *Allidem Mae G v Kwong Si Lin* [2003] (HCLA 35/2002) at [39] (noting that the bias rule “must bear in mind the specific characteristics and actual circumstances of the Labour Tribunal”).

[44] *R vs Sussex Justices Ex p McCarthy* [1924] 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that “[N]ext to the tribunal

being in fact impartial is the importance of its appearing so": *Shrager vs Basil Dighton Ltd* [1924] 1 KB 274 at 284.

[45] *See*, eg, *Ebner vs Official Trustee* [2000] HCA 63; (2000) 205 CLR 337 at 363 (Gaudron J) (HCA); Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [83] (Eng CA); *Lawal vs Northern Spirit Ltd* [2003] UKHL 35; [2004] 1 All ER 187 at [14], [21] (HL); *Forge vs Australian Securities Commission* [2006] HCA 44; (2006) 229 ALR 223 at [66] (Gummow, Hayne and Crennan JJ) (HCA). *See* also *Belilos vs Switzerland* [1988] ECHR 4; (1998) 10 EHRR 466 at [67] where the European Court of Human Rights explained that the bias rule, as it arose from Art 6 of the European Convention of Human Rights, was based upon the importance of "the confidence which must be inspired by the courts in a democratic society".

[46] *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37]- [39] (CA).

[47] *Anderton vs Auckland City Council* [1978] 1 NZLR 657 at 680 (SC NZ); *Australian National Industries Ltd vs Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 414 (NSW CA); *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [38] (CA).

[48] Groves, M. "The Rule Against Bias" [2009] UMonashLRS 10

[49] Ibid

[50] *See*, eg, *Sun vs Minister for Immigration and Ethnic Affairs* [1997] FCA 1488; (1997) 151 ALR 505 at 551-552 (Fed Ct, Aust); *Gamaethige v Minister for Immigration and Multicultural Affairs* [2001] FCA 565; (2001) 109 FCR 424 at 443 (Fed Ct, Aust). *See also Porter vs Magill* [2001] UKHL 67; [2002] 2 AC 357 at 489 where Lord Hope accepted that proof of actual bias was "likely to be very difficult".

[51] This expression of the bias test was suggested by the English Court of Appeal in *Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at 711 and adopted by the House of Lords in Porter v Magill [2001] UKHL 67; [2002] 2 AC 357.* The Australian test, which is explained below, also adopts an objective assessment and will be satisfied if there is a "possibility" that the decision-maker might not be impartial: *Ebner vs Official Trustee* [2000] HCA 63; (2000) 205 CLR 337 at 345.

[52] [1993] UKHL 1; [1993] AC 646 at 670.

[53] *Porter vs Magil* [2001] UKHL 67; [2002] 2 AC 357.